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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1208

WILLIAM E. SCHUPPENHAUER,

Petitioner,

vs.

THE PEOPLES GAS LIGHT & COKE COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois, First Judicial District, Third Division

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINION BELOW

The opinion of the Appellate Court of Illinois, First Judicial District, Third Division, is officially reported at 30 Ill. App. 3d 607 (1975), and, unofficially, at 332 N.E. 2d 583. The Illinois Supreme Court denied Petitioner's Petition for Leave to Appeal on November 24, 1975 without entering a written decision.

JURISDICTION

As is further discussed in Respondent's Argument herein, the jurisdiction of this Court to review by writ of certiorari a state court decision wherein the validity of a state statute is drawn into question as repugnant to the United States Constitution is improperly invoked by Petitioner under 28 U.S.C. § 1257(3). As Petitioner's Petition for a Writ of Certiorari (Page 2) reveals:

> This Federal Question was not raised in or passed on by the Circuit Court of Cook County, Illinois, or the Appellate Court of Illinois, but was presented to the Supreme Court of Illinois in a petition for leave to appeal as a matter of judicial discretion.

Since the federal constitutional issue raised in the Petition for a Writ of Certiorari was not properly and timely presented before the state courts below and not passed upon by the state courts, there can be no review by this court by writ of certiorari pursuant to 28 U.S.C. § 1257(3).

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STATEMENT OF THE CASE

In 1963 Petitioner filed a complaint for an accounting in equity in the Circuit Court of Cook County, Illinois, alleging that Respondent had appropriated certain ideas and procedures allegedly originated by Petitioner and allegedly disclosed to Respondent in confidence in 1933. On a limited reference to a Master, Respondent objected to Petitioner's evidence which consisted solely of Petitioner's uncorroborated testimony and certain exhibits, primarily letters and self-serving personal records of Petitioner, principally on the ground that such evidence was inadmissible under Section 4 of the Illinois Evidence Act, Illinois Revised Statutes, Chapter 51, Section 4 (1965) which prohibits and renders incompetent testimony by an adverse party as to admissions or conversations of deceased corporate agents unless a surviving agent is available and competent to testify as to the same admissions or conversations. Respondent also objected that the exhibits constituted self-serving hearsay.

The Master reserved his ruling on Respondent's objections until the conclusion of all of the Petitioner's evidence and then overruled objections of Respondent to the admissibility of Petitioner's evidence. Solely on the basis of Petitioner's evidence (Respondent not having yet introduced any evidence), the Master concluded that there was an enforceable obligation on the part of Respondent to compensate Petitioner.

Upon an agreed record, the Circuit Court of Cook County, Illinois held that the Master erred in his application of Section 4 of the Illinois Evidence Act in

denying Respondent's motion to strike Petitioner's testimony and exclude Petitioner's exhibits. The court further held that without Petitioner's testimony and exhibits, there was no evidence either in the record or available to establish an enforceable obligation on the part of Respondent to compensate Petitioner. The complaint was dismissed with prejudice.

The Illinois Appellate Court, First District, Third Division, affirmed the Circuit Court. On November 24, 1975, the Illinois Supreme Court denied Respondent's Petition for Leave to Appeal. The federal constitutional issue asserted herein as the basis for jurisdiction of this Court was first raised in Respondent's Petition for Leave to Appeal to the Illinois Supreme Court, filed September 29, 1975.

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ARGUMENT

Petitioner has failed to properly raise or preserve in the proceedings below the sole federal question presented to this Court for review and asserted as the basis for this Court's jurisdiction. The decisions of this Court have been unequivocal in holding that federal constitutional issues not considered below will not be passed on by this Court. "It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions." *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969); *Tacon v. Arizona*, 410 U.S. 351 (1973). The reasons for this policy have been clearly enumerated:

> In addition to the question of jurisdiction arising under the statute controlling our power to review final judgments of state courts, 28 U.S.C. § 1257, there are sound reasons for this. Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. And in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. Or the issue may be blocked by an adequate state ground. Even though States are not free to avoid constitutional issues on inadequate state grounds, *O'Connor v. Ohio*, 385 U.S. 92 (1966), they should be given the first opportunity to consider them. *Cardinale v. Louisiana*, 394 U.S. at 439.

Since Petitioner failed to raise the constitutional issue before the courts of the State of Illinois, his Petition for a Writ of Certiorari must be denied. Petitioner's attempt

to present his constitutional issue to the Illinois Supreme Court in his Petition for Leave to Appeal to that tribunal did not serve to raise or preserve this federal question below. Petitioner's attempted appeal to the Illinois Supreme Court on constitutional grounds was barred under Illinois law. Since Petitioner had not raised the constitutional issue before at any time in the proceedings before the Master, the Circuit Court of Cook County or the Illinois Appellate Court, he could not raise it before the Illinois Supreme Court on appeal. *Mechanics' & Traders' Savings Ass'n. v. People ex rel. Auditor of Public Accounts*, 184 Ill. 129, 56 N.E. 346 (1900); *People v. Amerman*, 50 Ill. 2d 196, 279 N.E. 2d 353 (1971).

The decisions of this Court are clear that the question of whether a federal question has been timely and properly raised or presented in the state court system is controlled by state law and will be followed by this Court. *Atlantic Coast Line R.R. Co. v. Mims*, 242 U.S. 532 (1917); *Hartford Life Insurance Co. v. Johnson*, 249 U.S. 490 (1919). Petitioner failed to present his constitutional issue before the Illinois courts and cannot now seek the jurisdiction of this Court on petition for writ of certiorari for an initial review of this constitutional issue.

Jurisdiction in this case is controlled by this Court's decision in *Pennsylvania R.R. Co. v. Illinois Brick Co.*, 297 U.S. 447 (1936). There it was held that this Court lacks jurisdiction to consider constitutional questions which the highest court of the state declined to hear because the issues were not raised or presented below. This Court there stated:

> The Illinois statute requires that in cases involving construction of the Federal Constitution

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> appeals from circuit courts shall be taken directly to the supreme court. And, as definitely shown by its decisions, that court will not take jurisdiction unless it appears from the record that the constitutional question was urged in the lower court, the ruling on it preserved in the record and the error assigned on appeal. While the order of that court transferring the case does not specify the grounds on which it was based, the petitioner states that the supreme court necessarily held the constitutional questions had not been properly raised and that, on the oral argument, the chief justice stated that the transfer would be made because of petitioner's failure properly to raise and preserve the constitutional questions. *As the highest court of the State declined to consider them because not raised in the circuit court or presented to it in accordance with practice that unquestionably was well established and reasonable, this court is without jurisdiction to consider either of them.* (Emphasis added.) *Pennsylvania R.R. Co. v. Illinois Brick Co.*, 297 U.S. at 462-63.

This Court has no jurisdiction to review constitutional claims never properly presented or considered below.

Since this Court has no jurisdiction in this matter, Petitioner's Petition for a Writ of Certiorari must be denied.

Petitioner's contention (Page 8) that "it would have been useless to raise the constitutional question in either the trial court or the Appellate Court by reason of the doctrine of stare decisis" cannot be taken seriously and only diminishes the seriousness of the unarticulated and unreasoned constitutional argument presented to this Court.

There are no grounds for invocation of this Court's jurisdiction on a writ of certiorari on Petitioner's assertion that the decision below has been decided erroneous-

ly. The opinion of the Illinois Appellate Court, First District, entered July 3, 1975, the full text of which is set out as Appendix A of Petitioner's Petition for Writ of Certiorari, affirming the order of the Circuit Court dismissing Petitioner's action for an accounting, correctly applied to this case Section 4 of the Illinois Evidence Act, Illinois Revised Statutes, Chapter 51, Section 4 (1965), and numerous decisions of Illinois courts: *Smith v. Billings*, 177 Ill. 446, 53 N.E. 81 (1898); *Trunkey v. Hedstrom*, 131 Ill. 204, 23 N.E. 587 (1890); *Helbig v. Citizens' Insurance Co.*, 234 Ill. 251, 84 N.E. 897 (1908); and *Brubaker v. Gould*, 34 Ill. App. 2d 421, 180 N.E. 2d 873 (1st Dist. 1962). The Appellate Court's decision concluded litigation which had been pending for twelve years. Both the Circuit Court of Cook County and the Illinois Appellate Court fully considered and rejected Petitioner's arguments. The Petition for Leave to Appeal to the Illinois Supreme Court was denied by that court. The Master who heard the evidence prepared two long reports, and the Circuit Court Judge, sitting as Chancellor, carefully and thoroughly reviewed the facts and law on exceptions from the Master's Report before entering his order reversing the Master. The Illinois Appellate Court wrote a long, detailed and reasoned opinion. The application and validity of Section 4 of the Illinois Evidence Act have been well considered in this case. There is no need for further review by this Court.

Petitioner does not raise an issue of public policy or concern.

Petitioner's reliance upon *Cole v. Arkansas*, 333 U.S. 196 (1948); *Musser v. Utah*, 333 U.S. 95 (1948); *Von Moltke v. Gillies*, 332 U.S. 708 (1948); and *Mahler v. Eby*, 264 U.S. 32 (1924) as authority for this Court's jurisdiction is sadly misplaced. The narrow holdings in these cases, involving appeals from criminal convictions where constitutional issues were properly raised below or appeals from dismissals of writs of habeas corpus, have no relevance to this case.

Despite Petitioner's attempts to variously characterize the issue presented to this Court, there are no valid grounds to support the review by this Court on writ of certiorari under Supreme Court Rule 19 and the decisions of this Court. This Court does not have jurisdiction under 28 U.S.C. § 1257(3).

CONCLUSION

For the foregoing reasons it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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